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7 *Attorneys for Plaintiffs*

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10  
11 HAFEN RANCH ESTATES, a Nevada Corporation;  
12 NYE COUNTY CONSTRUCTION, LLC, a Nevada  
13 Limited-Liability Company; and PAHRUMP  
14 UTILITY COMPANY, INC., a Nevada Corporation,

15 Plaintiffs,

16 v.

17 KEVIN MCGINNIS, a Nevada Resident; THE  
18 FORD METER BOX COMPANY INC., an Indiana  
19 Corporation; A.Y. MCDONALD MFG. CO., an  
20 Iowa Corporation; FERGUSON ENTERPRISES,  
21 INC., a Virginia Corporation; HD SUPPLY  
22 WATERWORKS, LP, a Florida Limited Partnership;  
U.S. FILTER DISTRIBUTION GROUP, INC., a  
Georgia Corporation; NATIONAL  
WATERWORKS, INC., a Texas Corporation; WFX,  
LLC d/b/a WESFLEX PIPE MANUFACTURING, a  
California Limited-Liability Company; CHEVRON  
PHILLIPS CHEMICAL COMPANY LP, a Texas  
Limited Partnership; DOES I-X; and ROE  
CORPORATIONS XI-XX,

23 Defendants.

10 Case No.: 2:10-CV-187-LRH-  
(RJJ)

11 **PLAINTIFFS' MOTION TO**  
**STRIKE DEFENDANT**  
**NATIONAL WATERWORKS,**  
**INC.'S UNTIMELY CONSENT TO**  
**REMOVAL**

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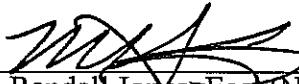
25 COME NOW Plaintiffs Hafen Ranch Estates, Nye County Construction, LLC, and  
26 Pahrump Utility Company, Inc., by and through their counsel of record, Kemp, Jones &  
27 Coulthard, LLP, and hereby file this Motion to Strike National Waterworks, Inc.'s Untimely  
28 Consent to Removal. This Motion is made and based upon the pleadings and papers on file

1 herein, the following Memorandum of Points and Authorities, and any such evidence as may be  
2 adduced at a hearing on this Motion.

3 DATED this 10th day of May, 2010.

4 Respectfully submitted by:

5 KEMP, JONES & COULTHARD, LLP

6  
7   
8 J. Randal Jones, Esq. (Nev. Bar No. 01927)  
9 Michael J. Gayan, Esq. (Nev. Bar No. 011135)  
10 3800 Howard Hughes Parkway, 17<sup>th</sup> Floor  
11 Las Vegas, Nevada 89169  
12 Attorneys for Plaintiffs

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I.**

15 **INTRODUCTION**

16 Defendant National Waterworks, Inc. ("National") failed to consent to removal within  
17 thirty (30) days after service of the complaint and summons as required by 28 U.S.C. § 1446(b).  
18 In Plaintiffs' Reply in Support of the Motion to Remand (Doc. #44), Plaintiffs pointed to the  
19 lack of consent by A.Y. McDonald Mfg. Co. as a fatal flaw to the notice of removal preventing  
20 this Court from retaining jurisdiction of this case. National attempted to avoid any further  
21 defects in the removal procedure by filing a Consent to Removal on April 22, 2010, over 80 days  
22 after the maximum time allowed under 28 U.S.C. § 1446(b) (Doc. #53). Nothing in the  
23 unambiguous statute, Ninth Circuit case law, or the facts of this case provide for an exception to  
24 the thirty-day time limit under these circumstances. As such, Plaintiffs ask this Court to strike  
25 and disregard National's Consent to Removal (Doc. #53).

26 **II.**

27 **MATERIAL FACTS**

28 On December 15, 2009, Plaintiffs filed a complaint in state court against Defendants for  
damages sustained to Plaintiffs' residential water service lines in the Artesia at Hafen Ranch  
Estates development located in Pahrump, Nevada. National was properly joined and served on

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1 January 26, 2010. This information was made available to all parties on January 27, 2010, when  
 2 the summons and affidavit of service were electronically filed with the state court.<sup>1</sup> On February  
 3 11, 2010, Defendant Ferguson Enterprises, Inc. ("Ferguson") filed a Notice of Removal (Doc.  
 4 #1). Ferguson's Notice of Removal contained a statement that counsel for HD Supply  
 5 Waterworks, LP ("HD Supply") had no objection to removal of this action (Doc. #1, 5:4-5).  
 6 Within two weeks of Ferguson filing its Notice of Removal, Defendants Chevron Phillips  
 7 Chemical Company LP ("CPChem"); HD Supply; McGinnis; and WFX, LLC dba Wesflex Pipe  
 8 Manufacturing ("WFX") filed papers indicating their consent to removal (Doc. # 5, 7 and 13).<sup>2</sup>  
 9 However, National failed to consent to removal until April 22, 2010 (Doc. #53).

10 **III.**

11 **ARGUMENT**

12 **A. National's Untimely Consent to Removal Must Be Stricken and Disregarded by this  
 Court.**

13 The federal statute governing removal procedures provides that:

14 The notice of removal of a civil action or proceeding *shall be filed within thirty  
 days* after the receipt by the defendant, through service or otherwise, of a copy of  
 15 the initial pleading setting forth the claim for relief upon which such action or  
 proceeding is based, or within thirty days after the service of summons upon the  
 16 defendant if such initial pleading has been filed in court and is not required to be  
 served on the defendant, whichever period is shorter.

17 28 U.S.C. §1446(b) (emphasis added). The statute's language of "whichever period is shorter"  
 18 indicates legislative intent to ensure the notice of removal deadline does not extend beyond the  
 19 earliest calculable thirty-day period. In cases involving multiple defendants, all defendants must  
 20 "either consent to or join the removal proceedings." *Knutson v. Allis-Chalmers Corp.*, 358  
 21 F.Supp.2d 983, 990 (D.Nev. 2005). The Ninth Circuit recently explained that the unanimity of  
 22 defendants rule may be satisfied either by each defendant filing a consent document or by "one  
 23

24  
 25 <sup>1</sup> See file-stamped copy of Summons and Affidavit of Service for National Waterworks, Inc., attached  
 26 hereto as Exhibit 1.

27 <sup>2</sup> At the time of Ferguson's Notice of Removal, potential issues existed regarding service for Defendants  
 28 The Ford Meter Box Company Inc. ("Ford") and U.S. Filter Distribution Group, Inc. ("U.S. Filter"). As  
 such, Plaintiffs do not raise these Defendants' failure to join in the Notice of Removal at this time.

1 defendant's timely removal notice containing an averment of the other defendants' consent and  
2 signed by an attorney of record." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225  
3 (9th Cir. 2009).

4 On January 26, 2010, Plaintiffs served National with the Summons and Complaint. *See*  
5 Exhibit 1. Under 28 U.S.C. §1446(b), National was required to file a notice of removal within  
6 thirty days (on or before February 25, 2010). National did not file a document showing its  
7 consent to removal until April 22, 2010, which is 86 days after the date on which it was served  
8 with the initial pleading and summons. Ferguson's Notice of Removal did not contain an  
9 averment that National consented to removal. The other Defendants' timely consent to removal  
10 documents do not contain an averment that National consented to removal. Under *Proctor*,  
11 National failed to timely consent to removal because it did not file a separate consent document  
12 within thirty days and it did not make sure that another Defendant in this action included a  
13 statement indicating National's consent to removal. Therefore, this Court should strike  
14 National's untimely Consent to Removal (Doc. #53) and disregard it when considering  
15 Plaintiffs' Motion to Remand (Doc. #44).

16 : **IV.**

17 : **CONCLUSION**

18 Plaintiffs ask this Court to strike National's untimely Consent to Removal (Doc. #53)  
19 because it was filed more than 50 days *after* the maximum time period allowed under 28 U.S.C.  
20 §1446(b).

21 DATED this 10th day of May, 2010.

22 : Respectfully submitted by:  
23 :  
24 :  
25 :  
26 :  
27 :  
28 :  


J. Randall Jones, Esq. (Nev. Bar No. 01927)  
Michael J. Gayan, Esq. (Nev. Bar No. 11135)  
3800 Howard Hughes Parkway, 17<sup>th</sup> Floor  
Las Vegas, Nevada 89169

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that service of the foregoing **PLAINTIFFS' MOTION TO STRIKE NATIONAL WATERWORKS, INC.'S UNTIMELY CONSENT TO REMOVAL** was made on the 10th day of May, 2010, via the United States District Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

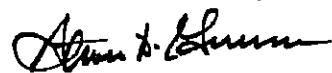
Janet M. Trullis  
An employee of Kemp, Jones & Coulthard

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# **EXHIBIT**

# **1**

Electronically Filed  
01/27/2010 01:15:24 PM



CLERK OF THE COURT

1 SUMM  
2 J. RANDALL JONES, ESQ. (#1927)  
2 MICHAEL J. GAYAN, ESQ. (#11135)  
3 KEMP, JONES & COULTHARD, LLP  
3 3800 Howard Hughes Parkway, 17<sup>th</sup> Floor  
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5 *Attorneys for Plaintiffs*

6

DISTRICT COURT

7

CLARK COUNTY, NEVADA

8

9  
10 HAFEN RANCH ESTATES, a Nevada  
Corporation; NYE COUNTY  
11 CONSTRUCTION, LLC, a Nevada Limited-  
Liability Company; and PAHRUMP  
12 UTILITY COMPANY, INC., a Nevada  
Corporation,

13

Plaintiffs,

14

v.

15 KEVIN MCGINNIS, a Nevada Resident;  
16 THE FORD METER BOX COMPANY  
INC., an Indiana Corporation; A.Y.  
17 MCDONALD MFG. CO., an Iowa  
Corporation; FERGUSON ENTERPRISES,  
18 INC., a Virginia Corporation; HD SUPPLY  
WATERWORKS, LP, a Florida Limited  
Partnership; U.S. FILTER DISTRIBUTION  
19 GROUP, INC., a Georgia Corporation;  
NATIONAL WATERWORKS, INC., a  
20 Texas Corporation; WFX, LLC d/b/a  
WESFLEX PIPE MANUFACTURING, a  
21 California Limited-Liability Company;  
CHEVRON PHILLIPS CHEMICAL  
22 COMPANY LP, a Texas Limited  
Partnership; DOES I-X; and ROE  
23 CORPORATIONS XI-XX,

24

Defendants.

25

SUMMONS - CIVIL

26

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU  
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.  
READ THE INFORMATION BELOW.

KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Parkway  
Seventeenth Floor  
Las Vegas, Nevada 89169  
(702) 385-6000  
Fax (702) 385-6001

1 **TO THE DEFENDANT NATIONAL WATERWORKS, INC.:** A civil Complaint has been  
2 filed by the Plaintiffs against you for the relief set forth in the Complaint.

3 1. If you intend to defend this lawsuit, within 20 days after this Summons is served  
4 on you, exclusive of the day of service, you must do the following:

5 a. File with the Clerk of this Court, whose address is shown below, a formal  
6 written response to the Complaint in accordance with the rules of the  
7 Court, with the appropriate filing fee.

10 2. Unless you respond, your default will be entered upon application of the Plaintiffs  
11 and failure to so respond will result in a judgment of default against you for the relief demanded  
12 in the Complaint, which could result in the taking of money or property or other relief requested  
13 in the Complaint.

14       3. If you intend to seek the advice of an attorney in this matter, you should do so  
15 promptly so that your response may be filed on time.

16 4. The State of Nevada, its political subdivisions, agencies, officers, employees,  
17 board members, commission members and legislators each have 45 days after service of this  
18 Summons within which to file an Answer or other responsive pleading to the Complaint.

19 | Submitted by:

CLERK OF COURT  DeEVRA KNIGHT  
By: \_\_\_\_\_ JAN 11 2010

21 J. Randall Jones, Esq. (001927)  
Michael J. Gaynor, Esq. (011135)  
22 KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Parkway  
23 Seventeenth Floor  
Las Vegas, Nevada 89169  
24 Tel. (702) 385-6000

By: Deputy Clerk Date  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

**NOTE:** When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure 4(b).

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1

AFFIDAVIT OF SERVICE

2

STATE OF \_\_\_\_\_ )

3

COUNTY OF \_\_\_\_\_ )

4

\_\_\_\_\_, being duly sworn, says: That at all times herein affiant was and  
is over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is  
made. That affiant received \_\_\_\_ copy(ies) of the Summons and Complaint, and Initial  
Appearance Fee Disclosure on the 26 day of January, 2010, and served the same on the  
26 day of January, 2010, by:

9

(Affiant must complete the appropriate paragraph)

10 1. Delivering and leaving a copy with the Defendant \_\_\_\_\_

11 at SEE ATTACHED AFFIDAVIT \_\_\_\_\_12 2. Serving the Defendant \_\_\_\_\_ by personally  
13 delivering a leaving a copy with \_\_\_\_\_, a person of suitable age and  
14 discretion residing at Defendant's usual place of abode located at \_\_\_\_\_

16 [User paragraph 3 for service upon agent, completing (a) or (b)]

17 3. Serving the Defendant \_\_\_\_\_ by personally  
18 delivering and leaving a copy at \_\_\_\_\_19 (a) With \_\_\_\_\_ as \_\_\_\_\_, an agent  
20 lawfully designated by statute to accept service of process;21 (b) With \_\_\_\_\_, pursuant to NRS 14.020 as a person of  
22 suitable age and discretion at the above address, which address is the address of the resident  
23 agent as shown on the current certificate of designation filed with the Secretary of State.24 4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a  
25 sealed envelope, postage prepaid (check appropriate method):

26      Ordinary mail  
27      Certified mail, return receipt requested  
28      Registered mail, return receipt requested

28 addressed to the Defendant \_\_\_\_\_, at Defendant's last known

1 address which is \_\_\_\_\_

2 I declare under penalty of perjury under the laws of the State of Nevada, that the  
3 foregoing is true and correct.

4 EXECUTED on this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

5 \_\_\_\_\_  
6 Signature of person making service  
7

8 Subscribed and sworn before me  
9 this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

10 \_\_\_\_\_  
11 Notary Public  
12 \_\_\_\_\_  
13 \_\_\_\_\_  
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**CAUSE NO. A-09-605966-D**

**HAFEN RANCH ESTATES, a Nevada Corporation; NYE COUNTY CONSTRUCTION, LLC, a Nevada Limited-Liability Company; and PAHRUMP UTILITY COMPANY, INC., a Nevada Corporation**

**In the Court of The**

**DISTRICT COURT**

**VS.**

**KEVIN MCGINNIS, a Nevada Resident; THE FORD METER BOX COMPANY INC., an Indiana Corporation; A.Y. MCDONALD MFG CO. an Iowa Corporation; FERGUSON ENTERPRISES INC., a Virginia Corporation; HD SUPPLY WATERWORKS, LP, a Florida Limited Partnership; U.S. FILTER DISTRIBUTION GROUP, INC., a Georgia Corporation; NATIONAL WATERWORKS, INC., a Texas Corporation; WFX, LLC d/b/a WESFLEX PIPE MANUFACTURING, a California Limited-Liability Company; CHEVRON PHILLIPS CHEMICAL COMPANY LP, a Texas Limited Partnership; DOES I-X; and ROE CORPORATIONS XI-XX**

**CLARK COUNTY, NEVADA**

**Defendant(s)**

**AFFIDAVIT OF SERVICE**

Came to hand on Tuesday, January 26, 2010, at 11:55 AM  
Delivered at: 4265 SAN FELIPE #1100, HOUSTON, TEXAS 77027  
Within the county of Harris at 12:15 PM on January 26, 2010,  
By delivering to the within named: HD Supply Waterworks Group, Inc., through its registered agent Corporate Creations Network, Inc.. Kim Harpman  
In person a true copy of this Summons, Complaint for Damages, Demand for Jury Trial and an Initial Fee Disclosure

BEFORE ME, the undersigned authority, on this day personally appeared Daniel Kennedy, who after being duly sworn on oath states: "My name is Daniel Kennedy, of 2530 Briar Ridge #66, Houston, Texas 77057, my telephone number is 713-865-2861, my SCH # is 003043, I am a person over eighteen (18) years of age and I am competent to make this affidavit. I am a resident of the State of Texas. I am not a party to this suit nor related or affiliated with any herein, and have no interest in the outcome of this suit. I am familiar with the Texas Rules of Civil Procedure, and the Texas Practice and Remedies Codes as they apply to service of process. I have never been convicted of a felony or of a misdemeanor involving moral turpitude."

Daniel Kennedy

Of: Harris County

By:   
Private Process Server

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public  
on this 27 TH day of January, 2010.

  
Notary Public State of Texas

